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No. 89-72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

AUTOMOBILE IMPORTERS OF AMERICA, INC., ET AL.,
Petitioners,

v.

STATE OF MINNESOTA, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Magnuson-Moss Warranty Act was enacted by Congress to make warranties more understandable and enforceable for consumers. Among its provisions, it encourages warrantors to establish informal arbitration mechanisms whereby consumer complaints can be fairly and expeditiously settled. Congress also directed the Federal Trade Commission to promulgate "minimum requirements" intended to promote the independence of these informal arbitration programs.

The question presented is:

Whether the Magnuson-Moss Act provisions encouraging the establishment of informal arbitration programs and authorizing the Federal Trade Commission to set minimum standards preempts any additional state requirements for such programs.

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The Respondents, the State of Minnesota and its Attorney General Hubert H. Humphrey III, respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 871 F.2d 717 (1989). The opinion of the United States District Court for the District of Minnesota is reported at 681 F. Supp. 1374 (1988).

STATEMENT OF THE CASE

Petitioners are foreign car manufacturers and their trade association, Automobile Importers of America, Inc. They seek to invalidate Minn. Stat. § 325F.665, subd. 6 (1988) ("Lemon Law"). Petitioners contend that three provisions of the Minnesota Lemon Law are preempted by the Magnuson-Moss Warranty Act ("Magnuson-Moss" or "the Act"), 15 U.S.C. § 2301 *et seq.* (1982), enacted by Congress in 1975. The auto makers challenge Minnesota Lemon Law provisions that: (1) require a manufacturer to operate or participate in a non-binding arbitration mechanism located in the State of Minnesota, Minn. Stat. § 325F.665, subd. 6(a); (2) require the arbitration mechanism to provide for an oral hearing if either party requests it, *Id.*, subd. 6(e); and (3) give a manufacturer the option of charging the consumer a nominal fee (not to exceed the filing fee for Conciliation Court, usually $10-20) to participate in the arbitration mechanism. *Id.*, subd. 6(i). (The auto makers' petition devotes scant attention to this last challenged element of the Lemon Law, perhaps in realization that a warrantor is not required to charge a fee or in recognition of the Eighth Circuit's observation that the fee is *de minimus* and not sufficient to deter consumer participation in arbitration programs. Pet. App. 17a.)

The United States District Court for the District of Minnesota held that the Minnesota Lemon Law provisions were not preempted by Magnuson-Moss. The United States Court of Appeals for the Eighth Circuit affirmed.

A. The Magnuson-Moss Warranty Act

Magnuson-Moss is a statute of limited scope and provides limited protections for consumers. Enacted by Congress in 1975, it is primarily a disclosure statute designed to insure that manufacturers' warranties do not mislead consumers. The Act does not require that products be warranted at all; it is primarily concerned with regulating the manner and form of disclosures and not the substantive terms of the warranties.

In addition to its disclosure requirements, Magnuson-Moss also provides for manufacturers to establish "informal dispute settlement mechanisms" through which consumer disputes concerning warranties can be settled. 15 U.S.C. § 2310 (1982). Any manufacturer which chooses to incorporate such an arbitration mechanism into its warranty documents must comply with the "minimum requirements" established pursuant to Federal Trade Commission Regulations, specifically "Rule 703" (16 C.F.R. § 703).

While Magnuson-Moss was clearly meant to expand the FTC's jurisdiction in the area of consumer protection, the Act itself delineates its relationship to state laws:

> (b) Rights, remedies, and liabilities
>
> (1) Nothing in this chapter shall invalidate or restrict any right or remedy of any consumer under State law or any other Federal law.
>
> (c) State warranty laws
>
> (1) Except as provided in subsection (b) of this section and in paragraph (2) of this subsection, a State requirement—
>
> (A) which relates to labeling or disclosure with respect to written warranties or performance thereunder;

(B) which is within the scope of an applicable requirement of sections 2302, 2303, and 2304 of this title (and rules implementing such sections), and

(C) which is not identical to a requirement of section 2302, 2303, or 2304 of this title (or a rule thereunder),

shall not be applicable to written warranties complying with such sections (or rules thereunder).

15 U.S.C. § 2311 (1982). Subsection (b) is commonly referred to as a "savings clause" and subsection (c) is referred to as a "preemption clause."

The Act's broad "savings clause" and clearly defined, narrow "preemption clause," evidence Congress' intent that the states remain free to craft remedies for consumers seeking redress regarding warranty disputes. If Congress had intended to preempt the states in the area of arbitration mechanisms, Congress could have easily included section 2310 among the preemptive provisions of section 2311(c) (1). Congress did no such thing. As contemplated by Congress, the Minnesota Lemon Law provides rights and remedies for consumers which supplement the consumer protection goals of Magnuson-Moss.

B. The Minnesota Lemon Law

In 1983, Minnesota became the third state to adopt a Lemon Law to establish protection for the owners of new cars who experience substantial and repeated repair problems. The Lemon Law has been amended twice, including the 1987 amendments which petitioners challenge in this petition. As amended, the law applies to any written express warranties on the vehicle for the length of the warranty, or two years, whichever comes first. Minn. Stat. § 325F.665, subd. 2 (1988),

Pet. App. 70a. If the manufacturer or authorized dealer is unable to repair a substantial problem covered by the warranty after a reasonable number of attempts, the consumer may seek a refund of the purchase price minus a reasonable deduction for the consumer's use of the vehicle. *Id.*, subds. 6, 7, and 9, Pet. App. 75a-78a. A manufacturer may require that a consumer use the manufacturer's arbitration mechanism prior to commencing a civil action. *Id.*, subd. 6(a), Pet. App. 75a. A manufacturer may unilaterally release a consumer from the "prior resort" requirement. *Id.*, Pet. App. 75a. If a manufacturer offers a replacement vehicle, the consumer may either accept the replacement vehicle or choose a refund. *Id.*, subd. 3, Pet. App. 70a-71a. The manufacturer need not make a refund or replace the vehicle if the problem does not substantially impair the use or market value of the vehicle, or if the problem is the result of the consumer's abuse, neglect or unauthorized modification of the vehicle. *Id.*, Pet. App. 71a.

In 1987, the Minnesota Legislature adopted amendments to the Minnesota Lemon Law. The purpose of the 1987 amendments was to ensure that consumers had access to a fast, fair, and affordable forum when they were saddled with a "lemon" car. The 1987 amendments require a manufacturer to operate or participate in a non-binding arbitration mechanism located in the State of Minnesota. Minn. Stat. § 325F.665, subd. 6(a) (1988), Pet. App. 75a. That program must comply with the FTC's Rule 703 requirements for arbitration programs as well as the requirements of state law. *Id.*, Pet. App. 75a. The arbitration mechanism must provide for an oral hearing if either party requests it. *Id.*, subd. 6(e), Pet. App. 76a. Under the law, a manufacturer has the option of charging the consumer a nominal fee to participate in the arbitration mechanism, but such fee may not exceed the filing fee for Conciliation

Court. *Id.*, subd. 6(i), Pet App. 77a. The decision of the arbitrator or arbitrators is not binding on the parties, unless otherwise agreed by the parties. *Id.*, subd. 7, Pet. App. 78a. Any party may remove the proceeding to district court for trial *de novo*. *Id.*, Pet. App. 78a.

The Minnesota Lemon Law sets forth standards for the operation of arbitration mechanisms. Manufacturers are free to design and operate their own programs or, if they prefer, participate in a program operated by an independent entity such as the Better Business Bureau or the American Arbitration Association.

C. Proceedings Below

On March 25, 1988, the District Court, the Honorable Diana E. Murphy presiding, granted summary judgment to defendants, State of Minnesota, with respect to plaintiffs' preemption challenge to the Minnesota Lemon Law. Relying upon the express language of Magnuson-Moss, the legislative history of the Act, FTC regulations, FTC statements, and judicial decisions regarding the issue, the District Court held that the Minnesota Lemon Law was not preempted by Magnuson-Moss or regulations promulgated thereunder.

On March 17, 1989, the Eighth Circuit, Judges Heaney, Henley and Fagg presiding, affirmed the District Court decision. The Eighth Circuit turned aside petitioner's preemption arguments, holding that: (1) Congress did not occupy the area of informal dispute resolution mechanisms; (2) the challenged provisions of the Minnesota Lemon Law did not conflict directly with the federal scheme; and (3) the Minnesota Lemon Law did not frustrate the broad goal of enhancing consumer protection or the specific goal of encouraging warrantor participation in arbitration mechanisms. Pet. App. 10a, 12a, 15a-17a.

REASONS FOR DENYING THE WRIT

This case does not merit review by this Court. The Eighth Circuit Court of Appeals, in a thoughtful and well-reasoned decision, found that Congress never intended to displace state laws which regulate arbitration mechanisms. The Court found that the Minnesota Lemon Law furthered the goals of Magnuson-Moss and supplemented the federal law. Pet. App. 17a. There are several reasons why the auto manufacturers' petition should be denied.

First, the Eighth Circuit Court of Appeals fully considered and correctly decided the issues in this matter. Relying upon the language, structure, and legislative history of the Act, and opinions issued by the Fifth Circuit and the FTC itself, the Eighth Circuit found no "clear statement" of federal occupation in this area, no impermissible conflict between federal and state law, and no frustration of the purposes and objectives of Congress. Petitioners' reference to *Taylor v. General Motors Corp.*, No. 87-5829 (11th Cir. June 14, 1989) (available on Westlaw) (to be reported at 875 F.2d 816) (no presumption against preemption when deciding whether state law *conflicts* with federal law), fails to require a conclusion that the Eighth Circuit misread federal law.

Second, there is no actual conflict in the circuit courts. Only two circuits have analyzed the issue regarding state regulation, *via Lemon Laws*, of arbitration mechanisms. Both the Eighth Circuit, in this matter, and the Fifth Circuit, *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985), have held that the states possess authority to regulate arbitration mechanisms beyond the "minimum requirements" set forth in Rule 703. Petitioners' reliance upon *Wolf v. Ford Motor Co.*, 829 F.2d 1277 (4th Cir. 1987), as support for the existence of a conflict in the circuit courts is misplaced.

The facts of *Wolf* and the legal analysis from the case which petitioners rely upon fail to present a conflict with the decisions reached by the Eighth and Fifth Circuits.

Third, the specific issues presented in this matter have recently been considered by a federal district court in New York. *See Motor Vehicle Mfrs. Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988). Although the District Court held that Magnuson-Moss did preempt the challenged New York Lemon Law provisions, the State of New York is pursuing an appeal to the Second Circuit. By waiting for a decision from the Second Circuit Court of Appeals, this Court would have the benefit of further analysis and discussion of the issues at hand, and an additional indication whether there is indeed any conflict among the circuits.

Finally, the decision reached by the Eighth Circuit was a fair result. As noted in the auto manufacturers' petition, more than 40 states have enacted Lemon Laws during the past seven years. The legislative explosion in this area is due in large part to the auto makers' failure to voluntarily establish programs satisfying even the "minimum requirements" set out in Rule 703. Forty-six states, including Minnesota, have stepped into the regulatory void and enacted legislation ensuring consumers access to a fast, fair and affordable forum to resolve warranty disputes.

1. The Eighth Circuit Correctly Decided That The Minnesota Lemon Law Supplements Magnuson-Moss And Regulations Promulgated Thereunder.

Implied preemption of state laws occurs under certain limited circumstances.

> If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted. . . .

> If Congress has not entirely displaced state regulations over the matter in question, state law is still preempted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

Louisiana Public Service Comm'n v. F.C.C., 106 S.Ct. 1890, 1896 (1986). Petitioners fail to make a case that any of these preemption theories are applicable to this matter.

Petitioners assert that the Eighth Circuit misread federal law and gave "too much deference to state regulation and too little to federal regulation." Pet. 12. Their conclusion is based upon a reading of Magnuson-Moss that mischaracterizes and trivializes the true purpose of the Act—consumer protection—an area that has traditionally been regulated by the states.

Reduced to its essence, the petitioners' argument is that once Congress legislates in a particular area, any additional regulation by the states upsets the "balance" of the federal legislation. Petitioners' view of Congress' intent ignores the traditional role of federal legislation.

> Federal legislation has traditionally occupied a limited role as the *floor* of safe conduct; before transforming such legislation into a *ceiling* on the ability of states to protect their citizens, and thereby radically adjusting the historic federal-state balance [citations omitted], courts should wait for a clear statement of congressional intent to work such an alteration.

Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1543 (D.C. Cir. 1984) (emphasis in original). *See also Florida Lime And*

Avocado Growers, Inc. v. Paul, 373 U.S. 132, 147-48 (1963); *California Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987).

The Eighth Circuit found no "clear statement" of congressional intent in Magnuson-Moss to occupy the field of regulation of arbitration mechanisms. The Court therefore concluded that the central focus of the federal regulation was the enhancement of consumer protection—not setting in stone some federal notion of balance between warrantors' desires and consumers' needs. Indeed, the Eighth Circuit found ample evidence to indicate that Congress contemplated supplemental state regulation in this area. Pet. App. 8a-9a. The broad savings clause of the Act followed by explicitly delineated areas of preemption demonstrates Congress' intent to permit supplemental state regulation in areas not specifically preempted.

In reaching its decision, the Eighth Circuit relied upon the express language, structure, and legislative history of the Act, the nature of the regulations set forth in Rule 703, an analysis of the same issues by the Fifth Circuit Court of Appeals and pronouncements by the Federal Trade Commission. To avoid duplication and heed this Court's admonition to keep response briefs as short as possible, Supreme Court Rule 22.2, the State of Minnesota directs the Court's attention to the Eighth Circuit's analysis. Pet. App. 6a-10a. The thorough and correct analysis by the Eighth Circuit clearly indicates that Congress had no intention of occupying the field of regulation of arbitration mechanisms.

Petitioners also offer *Taylor v. General Motors Corp.*, No. 87-5829 (11th Cir. June 14, 1989) (available on Westlaw) (to be reported at 875 F.2d 816) for their position that the Eighth Circuit inappropriately required a "clear statement of

occupation" in its preemption analysis. Pet. 12. Petitioners' reliance on *Taylor* is based upon a faulty premise, however. As noted above, there are three distinct theories of implied preemption: occupation of the field; conflict with federal law; and frustration of the full purposes and objectives of Congress.

Assuming arguendo that the *Taylor* court correctly stated that "no such [strong presumption against preemption] is applicable in deciding whether state law *conflicts* with federal law, even where the subject of the state law is a matter traditionally regarded as properly within the scope of the states' rights," *Id.*, slip op. at 12 (emphasis added), the clear fact remains that petitioners are comparing apples to oranges. In footnote 14 of *Taylor*, the Eleventh Circuit notes that "the manufacturers concede that Congress did not intend to occupy the entire field of automotive safety: therefore, [this] type of preemption is not applicable to this case." The occupation theory of implied preemption was not at issue in *Taylor* and petitioners' use of the language from that case is an erroneous generalization.

The Eighth Circuit aligned itself with the Fifth Circuit on the requisite congressional intent to infer federal occupation of a field: "We agree with the Fifth Circuit that to infer preemption in an area traditionally regulated by the states—consumer protection through warranty law—requires a 'clear statement' of occupation. We find no 'clear statement' of congressional intent to preempt here." Pet. App. 8a. More importantly, the Eighth Circuit concluded that the language, structure and history of Magnuson-Moss all emphasize its "supplemental, rather than preemptive nature." *Id.* Petitioners' reliance on *Taylor* fails to yield a judgment that the Eighth Circuit misread federal law.

Petitioners also contend that the Minnesota Lemon Law impermissibly interferes with the regulatory scheme embodied in Magnuson-Moss and Rule 703. Pet. 19 *et seq.* This preemption theory was also rejected by the Eighth Circuit. *See also Chrysler Corp. v. Texas Motor Vehicle Comm'n*, 755 F.2d 1192 (5th Cir. 1985); *Chrysler Corp. v. Armstrong*, No. 83-45 (D. Ky. April 30, 1985). In large part, this is based upon reluctance to infer preemption: the "teaching of this Court's decisions . . . enjoins seeking out conflicts between state and federal regulation where none clearly exists." *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978).

There is no direct conflict between the Minnesota law and the federal rules. As the Eighth Circuit observed, "Minnesota requires automobile manufacturers to establish or participate in an informal dispute resolution mechanism satisfying FTC requirements. Federal law makes warrantors' participation in such mechanisms optional. Strictly speaking, compliance with both laws is not a physical impossibility. When an automobile manufacturer complies with Minnesota's law by providing an informal dispute mechanism, that manufacturer is not violating federal law." Pet. App. 11a. The same analysis is equally germane to the Lemon Law provision that permits each party to appear and make an oral presentation. Minn. Stat. § 325F.665, subd. 6(e) (1988). Pet. App. 76a. "If the warrantor and consumer abide by the Minnesota rule, then the FTC rule is not violated." Pet. App. 11a-12a. *See* FTC Staff Opinion attached to *Chrysler Corp. v. Armstrong*, No. 83-45 (D. Ky. April 30, 1985) (relevant parts of the FTC Staff Opinion can be found at Pet. App. 9a-11a).

Petitioners' conflict theory is dependent upon the holding in *Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta*, 479 U.S. 272 (1987). The District Court below explained:

> Plaintiffs' reliance on *Fidelity* is misplaced, however. *Fidelity* involved a situation where federal law gave entities an option to include such clauses while state law prohibited them from doing so. Magnuson-Moss gives manufacturers the option to establish informal dispute settlement mechanisms. The lemon law does not prohibit manufacturers from establishing such mechanisms, as was the case in *Fidelity*, but rather requires them to do so. *Fidelity* therefore does not require a finding that the lemon law is in actual conflict with the federal law.

Pet. App. 28a-29a.

Furthermore, the petitioners' "reliance on *Fidelity* is plausible only if Magnuson-Moss is interpreted as granting to manufacturers an affirmative right *not* to offer settlement mechanisms." Pet. App. 29a. (Emphasis in original).

The petitioners' crabbed reading of Magnuson-Moss also failed to persuade the Eighth Circuit. The appellate court in *Fidelity* correctly pointed out that the Federal Home Loan Bank Board clearly expressed the policy that the option of whether to have a "due on sale" clause was an important policy objective of the federal rule. "No such congressional policy of 'flexibility' exists in the adoption of the Magnuson-Moss Warranty Act." Pet. App. 14a. The professed purpose of Magnuson-Moss is enhancement of consumer protection, and requiring warrantor participation in arbitration programs is entirely consistent with that purpose. Pet. App. 12a; H.R. Rep. No. 1107, 93rd Cong., 2nd Sess., *reprinted in* 1974 U.S. Code Cong. & Admin. News 7702 and 7722.

Petitioners "think that the difference between 'encouraging' mechanisms and mandating them is self-evident." Pet. 22. Yet, in a recent proceeding in a New York federal district court,

petitioners themselves appear to agree that they are consistent. In *Motor Vehicle Manufacturers Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988), the district court agreed with petitioners that the Minnesota law does not obstruct the goal of encouraging manufacturers' participation in arbitration programs. "We agree with Plaintiffs [Automobile Importers of America, Inc. and Motor Vehicle Manufacturers of the United States, Inc.] that since the Minnesota statute *requires* manufacturers to establish informal dispute settlement mechanisms (*A.I.A. v. Minnesota*, 681 F. Supp. at 1376), it cannot be attacked as obstructing the goal of *encouraging* them to do so, and thus it is distinguishable." *Id.* at 737 (emphasis added). The State of Minnesota agrees that its Lemon Law supplements the Congressional goal of encouraging warrantor participation in arbitration programs. *See also* Pet. App. 15a-16a.

Additionally, the State of Minnesota maintains that the district court was correct in its assessment that "[A]lthough the legislative history suggests some concern with fairness to manufacturers, the overriding intent behind Magnuson-Moss appears to have been to enhance consumer protections. The legislative history reflects a perception on the part of Congress that consumers were inadequately protected. Plaintiffs' contention that a significant congressional purpose behind Magnuson-Moss was to convey rights to manufacturers is unsupported." Pet. App. 29a-30a. After analyzing separately each aspect of the Minnesota Lemon Law, the Eighth Circuit also concluded that the state law did not frustrate the purposes of Magnuson-Moss. Pet. App. 12a-17a.

Petitioners' arguments were fully considered and properly rejected by both lower courts. No further review is warranted.

2. There Is No Conflict In The Circuit Courts Regarding The Question Presented In This Matter.

Petitioners cite two cases for their assertion that there is a conflict in the circuit courts regarding the issue presented in this matter: *Chrysler Corp. v. Texas Motor Vehicles Comm'n*, 755 F.2d 1192 (5th Cir. 1985), and *Wolf v. Ford Motor Corp.*, 829 F.2d 1227 (4th Cir. 1987). A careful reading of the two cases fails to yield the conclusion posited by petitioners.

In *Chrysler Corp. v. Texas Motor Vehicle Comm'n*, the Fifth Circuit rejected the contention that § 2310 of Magnuson-Moss or Rule 703 evidenced congressional intent to occupy the field of regulation of arbitration programs. In holding that the Texas Lemon Law was not preempted, the Fifth Circuit stated:

> [H]ere we find no clear statement either in the express language of section 2310 or in its legislative history of any intention by Congress to occupy the field of informal settlement mechanisms for warranty disputes. To the contrary, we find substantial indications that state-created avenues of relief such as those offered by the lemon law are not preempted by Magnuson-Moss. As noted above, *section 2311 of Magnuson-Moss preserves for consumers any rights or remedies created by state law.*

755 F.2d at 1205 (emphasis added).

The Fifth Circuit also held that the Texas Lemon Law did not conflict directly with the federal scheme nor did it interfere with the attainment of the full purposes and objectives of Congress in enacting Section 2310. *Id.* at 1205-06.

Petitioners wrench a single sentence from the Fifth Circuit's opinion and seek to draw a distinction between the state-run program in *Chrysler* and the programs required by the

Minnesota Lemon Law: "We think it plain that the preclusive effect of section 110 (15 U.S.C. § 2310) is limited to rules governing informal dispute resolution procedures created by private warrantors and does not effect such schemes where provided as an option for consumers by state law." Pet. 14.

The Eighth Circuit correctly placed emphasis on the phrase "does not effect such schemes where provided as an option for consumers by state law." Pet. App. 8a. The State of Minnesota has provided "an option for consumers by state law" that supplements the minimum requirements set forth in Magnuson-Moss and its implementing regulations. In Minnesota, the arbitration option is not "created by private warrantors," but is mandated by state law. The fact that the Minnesota law falls short of creating a state bureaucracy does not diminish its nature as a state right or remedy preserved to the states by Section 2311 of Magnuson-Moss. Indeed, the Minnesota Lemon Law gives auto makers the flexibility of creating their own arbitration programs or making arrangements with a third party, such as the Better Business Bureau or American Arbitration Association. Petitioners' arguments that *Chrysler Corp. v. Texas Motor Vehicles Comm'n* manifests a conflict between the Fifth and Eighth Circuits is unsupported. Rather, the Eighth Circuit relied heavily upon the Fifth Circuit's analysis in reaching its own decision in this matter. Pet. App. 10a, 16a.

In *Wolf v. Ford Motor Company*, 829 F.2d 1277 (4th Cir. 1987), the Fourth Circuit upheld the dismissal of a common law fraud action, holding that such an action was preempted by Magnuson-Moss and Rule 703. For a variety of reasons, *Wolf* fails to present a conflict with the instant case.

The issue presented by the manufacturers' petition was not before the court in *Wolf*. As noted by the district court below,

the dispute here "concerns the power of a state legislature to attempt to enhance protections accorded consumers by federal law." Pet. App. 25a. A crucially different factual dispute was heard and decided by the Fourth Circuit. In *Wolf*, a dissatisfied consumer charged that Ford Motor Company had fraudulently represented that its private arbitration board was independent and impartial. Here, the auto manufacturers are the moving party, maintaining that a state lemon law statute should be swept aside. The action in *Wolf* did not involve a state lemon law statute, Pet. App. 25a, and is necessarily a different factual matter than the cases heard by the Eighth and Fifth Circuits.

Further, the Fourth Circuit reached its decision without the benefit of the views of the FTC or the State of Virginia, the two parties most affected by the appellate court's judgment. Again, the different factual scenario is a likely explanation for the absence of commentary by those parties. Finally, the Fourth Circuit issued its decision despite the absence of any reference to the statutory language of Magnuson-Moss or its legislative history. In sum, the *Wolf* case fails to present an actual conflict with this case and the Fifth Circuit decision in *Chrysler*.

3. Consideration Of The Issue Presented Would Not Be A Wise Use Of The Supreme Court's Resources.

Another case is working its way through the federal court system which could result in a thorough delineation of this issue by another Circuit Court of Appeals. *See Motor Vehicle Manufacturers Ass'n v. Abrams*, 697 F. Supp. 726 (S.D.N.Y. 1988). In *Abrams*, the petitioners in the instant case, joined by the Motor Vehicle Manufacturers Association (representing

the domestic auto manufacturers), challenge on preemption grounds provisions of the New York Lemon Law that impose additional requirements beyond those required by Magnuson-Moss and Rule 703, including a requirement that arbitration programs allow oral hearings if the consumer so requests. New York General Business Law § 198-a(m) (1) (i).

On October 13, 1988, the United States District Court for the Southern District of New York issued a decision upholding the auto makers' preemption arguments. The State of New York is pursuing an appeal of the District Court decision, but that appeal has been delayed by the procedural posture of the case. (The auto makers challenged other provisions of the New York Lemon Law on Commerce Clause grounds. The presiding judge has denied the State of New York's motion for an expedited appeal on the preemption claim, pending a final judgment on the Commerce Clause issues before the court. The Commerce Clause issues have been briefed and argued; the parties are waiting for a decision by the court.)

The Second Circuit Court of Appeals may soon have an opportunity to analyze the identical issues presented to this Court. The benefit to this Court is clear. If the Second Circuit accepts the arguments regarding preemption advanced by the State of New York, it will align itself with the Eighth and Fifth Circuits. Such unanimity in the circuit courts would obviate the need for review by this Court. If the Second Circuit were to find itself in agreement with the auto makers, then there would be an actual conflict in the circuit court system. Any subsequent review of the matter by this Court would have the benefit of further discussion and analysis by the Second Circuit.

4. The Eighth Circuit Rendered A Fair Decision.

This Court should not overlook the fairness of the decision handed down by the Eighth Circuit Court of Appeals. Petitioners' "balance" arguments notwithstanding, the primary purpose of Magnuson-Moss is enhancement of consumer protection. That purpose is vividly illustrated in the Act's legislative history, which reflects the inequities between consumers and manufacturers:

> Paralleling the growth of acquisition of consumer products has been a growing concern of the American consumer with the quality and durability of many of those products. Another growing source of resentment has been the inability to get many of those products properly repaired and the developing awareness that the paper with the filigree border bearing the bold caption "Warranty" or "Guarantee" was often of no greater worth than the paper it was printed on. Indeed, in many cases where a warranty or guarantee was ostensibly given the old saying applied "The bold print giveth and the fine print taketh away." For the paper operated to take away from the consumer the implied warranties of merchantability and fitness arising by operation of law leaving little in its stead.

H.R. Rep. No. 1107, 93d Cong. 2d Sess. *reprinted in* 1974 U.S. Code Cong. & Admin. News 7706.

The District Court recognized that the State of Minnesota, by enacting its Lemon Law, "seeks to further the congressional goal of protecting consumers by enhancing the protections established by Magnuson-Moss." Pet. App. 30a. The Eighth Circuit echoed this sentiment, stating "By enacting the Mag-

nuson-Moss Warranty Act, Congress has increased the economic strength of consumers. . . . Congress intended state regulation, like the Minnesota Lemon Law, to operate with the Warranty Act in a mutually supplementary manner. The Minnesota law does nothing to defeat this result." Pet. App. 17a.

Moreover, there is a sound explanation for the legislative explosion of state Lemon Laws which petitioners bemoan. Pet. 24. Magnuson-Moss was enacted in 1975. During the seven year interim between 1975 and 1982, only *one* auto manufacturer (Chrysler Corporation) purported to offer an arbitration program that satisfied even the "minimum requirements" of Rule 703. 54 Fed. Reg. 21070 (May 16, 1989). The enactment of the first Lemon Law in 1982, and the subsequent enactment of more than forty Lemon Laws, represents the states' response to this regulatory void. A roll-back of state legislation in this area would leave auto manufacturers free once again to offer sadly inadequate arbitration programs or no programs at all.

Sprinkled throughout the manufacturers' petition are references to the costly additional requirements imposed by Minnesota and other states. Pet. 20-21, 25. As noted by the District Court below, the petitioners' cost arguments have no basis in fact. Pet. App. 32a. It should be noted that the auto manufacturers elected to withdraw their taking claim on appeal to the Eighth Circuit. Pet. App. 6a.

In sum, the State of Minnesota asserts that the vehemence of the manufacturers' opposition to the lemon law is a testimony to the statute's effectiveness. It does indeed provide increased economic strength to consumers and is therefore fully in accord with the purpose and spirit of Magnuson-Moss.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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